



DAVID E. JANSSEN
Chief Administrative Officer

County of Los Angeles

CHIEF ADMINISTRATIVE OFFICE

713 KENNETH HAHN HALL OF ADMINISTRATION • LOS ANGELES, CALIFORNIA 90012
(213) 974-1101

Hammond

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July 23, 2001

To: Supervisor Michael D. Antonovich, Mayor
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Supervisor Zev Yaroslavsky
Supervisor Don Knabe

From: David E. Janssen
Chief Administrative Officer

CONTRACTING: EVALUATION OF LABOR LAW AND PAYROLL VIOLATIONS FOR CONTRACTS SUBJECT TO THE LIVING WAGE

On April 10, 2001, on motion of Supervisor Molina, the Board instructed this office, County Counsel, the Director of the Internal Services Department (ISD), and Auditor-Controller to: 1) review all County department evaluation tools for labor violations subject to the Living Wage Ordinance and to provide clear, consistent guidelines, and standards for evaluation; and, 2) report back to the Board within 60 days with standards that consider the severity and extent of the labor violations and provide definitions of terms to proposers. This memorandum and the attachment provide the requested guidelines and standards and establish a centralized evaluation process to promote uniformity in evaluating the severity and extent of such violations effective for all solicitations issued August 1, 2001 or later.

Review of Evaluation Tools

As requested, my office convened a working group consisting of representatives from Auditor-Controller, County Counsel, ISD, the Office of Affirmative Action Compliance (OAAC), and the Department of Public Works to assess departmental tools for evaluating violations and develop consistent guidelines and standards for evaluation of violations. ISD collected nine evaluation tools from departments via the Contract Managers Network. Each instrument established a different methodology for scoring violations, but most attempted to weigh the level of severity and patterns of such violations in the proposal evaluation process. Some evaluation tools added points to the evaluation score for a good record, and others deducted points for a poor record. In addition, the working group determined that information received from proposers and from the State Division of Labor Standards Enforcement (DLSE) regarding complaints, investigations or proceedings related to labor law violations was frequently difficult to reconcile and interpret.



Before attempting to classify violations and develop guidelines, the working group inquired of DLSE what methodology or guidelines its employees use to distinguish between major and minor labor law abuses. DLSE staff advised that it does not attempt to classify violations or assess the employer's intent (e.g., inadvertent vs. willful). With respect to the DLSE process, an employee may file a claim with DLSE against his employer when he/she believes there has been a violation of labor law. These claims may remain as pending open cases until the issue is resolved in some manner and a disposition letter is issued. Some claims are "abandoned," others are "settled" or "paid in full." Some are resolved quickly, while other claims and dispositions are appealed and take a long time to resolve.

The working group further determined that there are a variety of different types of violations and that there are numerous situational variables that could impact the severity of any particular violation, whether willful or inadvertent. Any classification of violations would necessarily require flexibility to address variables such as the number of employees impacted, the dollar amount of lost wages and patterns of violations by an employer, as well as the employer's explanation of the circumstances leading to the violation. For example, a violation related to improper classification of an employee as an "independent contractor" resulting in the employer's failure to withhold taxes or pay overtime could be major, if it impacts numerous employees or has been a repeated violation, but minor if only one employee out of a multi-employee work pool is inadvertently mis-classified.

A critical initial step in developing an evaluation tool and guidelines was to define a labor law violation. As used in the Proposition A and/or cafeteria services contract proposal evaluation process, a "Labor Law/Payroll Violation" includes violations of any Federal, State or local statute, regulation or ordinance pertaining to wages, hours, working conditions such as minimum wage, prevailing wage, living wage, the Fair Labor Standards Act, employment of minors, or unlawful employment discrimination. The County may deduct points from a proposer's final evaluation score only for Labor Law/Payroll Violations with disposition by a public entity within the past three years of the date of the proposal.

Labor Law/Payroll Violations Assessment Team

Acknowledging the variety of potential violations and the lack of experience of departmental staff in assessing the severity and extent of such violations, the working group decided that the evaluation function should be centralized with a new Labor Law/Payroll Violations Assessment Team (Assessment Team). The Assessment Team will consist of three staff, one representative each from the Auditor-Controller, ISD, and this office. County Counsel will serve as the legal adviser to this Assessment Team.

It must be noted that the Assessment Team process will extend the departmental proposal evaluation period. This additional time must be considered by departments in scheduling solicitations for ongoing services. However, it is anticipated that centralizing this function will promote development of expertise and greater uniformity in the evaluation process.

The attachment provides guidelines for Assessment Team operations and revisions to the contracting process for Proposition A and cafeteria services contracts. The guidelines:

1. Establish four general categories for the severity of violations (major, significant, minor, and insignificant), and establish criteria to evaluate the extent of such violations and to assess a point deduction, ranging from 1 percent to 20 percent of the total proposal evaluation points available, with the potential for substantially larger deductions for undisclosed violations. The deductions are within a standardized percentage range for each category and are determined by the Assessment Team after the department has completed its formal proposal evaluation process, exclusive of assessing violations.
2. Establish criteria for departments to make referrals to the Assessment Team without revealing the proposers' evaluation scores or the point differential between proposers.
3. Require inclusion of mandatory language, which has been approved by County Counsel, in all solicitations for Proposition A and cafeteria services contracts. This language clearly defines the County's disclosure requirement regarding violations and pending claims and the process for evaluating violations that are either disclosed or undisclosed by the proposer.
4. Require a revised *Acknowledgment and Statement of Compliance* (a form which is required from all proposers for Proposition A and cafeteria services contracts) which clearly defines the County's disclosure requirement regarding violations and pending claims and the assessment of such violations and pending claims that are either disclosed or undisclosed by the proposer. The form also permits the proposer to offer an explanation concerning the circumstances leading to any violation(s) and/or pending claim(s).
5. Require inclusion of mandatory language, which has been approved by County Counsel, in all Proposition A and cafeteria services contracts. This language defines the contractor's responsibility to disclose violations and/or claims throughout the term of the contract.

6. For existing contracts, require issuance of a change notice or contract modification to update contract terms as soon as possible but no later than the time a department exercises an option to renew a Proposition A or cafeteria services contract.
7. Provide flexibility for the Assessment Team to assess variables such as the dollar value of the violation, clerical error, the number of employees impacted, the number of occurrences, and any fines and/or penalties assessed by DLSE or other public entities, and whether or not the proposer disclosed the violation during the solicitation process.

The procedures will become effective for all solicitations issued August 1, 2001 or later. This start-up period is necessary to complete revisions to the Living Wage Implementation Plan and the Training Manual, establish the administrative procedures for the Assessment Team, and distribute materials and train department staff. During this interim period, departments with solicitations underway for Proposition A and/or cafeteria services contracts may contact Don Chadwick, of the Auditor-Controller, at (213) 974-0333 for guidance related to rating violations, consistent with the Assessment Team Guidelines. Effective August 1, 2001, departments shall utilize the Assessment Team process described in the attachment.

Summary of Impacts

Establishing the Assessment Team will:

- ☐ Centralize responsibility for assessing the severity and extent of violations to develop expertise and promote greater uniformity in the evaluation process. Departments will continue to evaluate proposals, but will no longer rate violations since that function will be transferred to the Assessment Team.
- ☐ Lengthen the proposal evaluation process which will impact the solicitation time table for any departmental resolicitation for existing services. In the event a proposer protests a department's final evaluation rating because of a deduction for violations, a member of the Assessment Team will be available to the contracting department to explain the Assessment Team's rating.
- ☐ Initially, the recommended centralized review process will be handled with existing resources. However, actual experience may indicate the need for additional resources in the future, when existing Proposition A and cafeteria services contracts expire and must be rebid.

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We will provide a status report to the Board six months following the August 1, 2001 effective date after the Assessment Team has gained experience with the process.

The centralized Assessment Team process is consistent with the County's Strategic Plan: Goal No. 3, Organizational Effectiveness; Strategy No. 2, Improve Internal Operations; and Objective 3.2.2., Assess key systems and processes that could benefit from countywide leadership.

Please let me know if you have any questions or your staff may contact Nan Flette of this office at (213) 974-1168.

DEJ:LS
MKZ:NF:os

Attachment

c: All Department Heads
Director of the Office of Small Business

**ASSESSMENT GUIDELINES FOR LABOR LAW/PAYROLL VIOLATIONS AND
UNFAVORABLE LABOR LAW/PAYROLL AUDIT FINDINGS**

In these Assessment Guidelines, a "Labor Law/Payroll Violation" includes violations of any Federal, State or local statute, regulation or ordinance pertaining to wages, hours, working conditions such as minimum wage, prevailing wage, living wage, the Fair Labor Standards Act, employment of minors, or unlawful employment discrimination. The County may deduct points from a proposer's final evaluation score only for Labor Law/Payroll Violations with disposition by a public entity within the past three years of the date of the proposal.

The Living Wage Implementation Plan for Proposition A and cafeteria services contracts currently requires that a department allocate 20 percent of the total proposal evaluation points for the department's assessment of the proposer's "performance history" (formerly "references") and labor law/payroll practices and/or unfavorable labor law/payroll audit findings. The establishment of the Labor Law/Payroll Violations Assessment Team (Assessment Team) changes these requirements and procedures **effective August 1, 2001**.

Summary of Changes

- ☐ With the establishment of the Assessment Team, departments are no longer responsible for assessing the severity and extent of violations; the Assessment Team will assume this responsibility.
- ☐ Departments remain responsible for gathering as much information as possible about any violation and/or pending claim for proposers who could potentially be recommended for a contract award.
- ☐ Proposer performance history and violations become separate proposal evaluation factors:
 - Departments will continue to evaluate proposer performance history, which will account for a minimum 10 percent of the total proposal evaluation points. The remaining 10 percent, formerly available for evaluation of performance history and/or violations, will be allocable to other priority areas, as identified in the Request for Proposals. Departments will complete the evaluation and ranking of proposals prior to the Assessment Team's assessment of any violations.
 - The Assessment Team will assess violations as a factor distinct from the departmental proposal evaluation process, utilizing the Assessment Guidelines provided in the attached Exhibit, and recommend a percentage point deduction from the proposer's evaluation score, if appropriate, ranging from 1 percent to 20 percent of the total evaluation points available.

Assessment Team Guidelines

The Guidelines for Assessment of violations (refer to Exhibit) establish four general categories for assessing the severity and extent of violations -- major, significant, minor, and insignificant -- and suggest various criteria to determine the appropriate percentage deduction from a proposer's evaluation score for the violations. The percentage point deductions that the Assessment Team may assess are within established percentage ranges for each category and, to encourage full disclosure, larger percentage deductions are established for a proposer's undisclosed violations. The Assessment Team has flexibility within these Guidelines to consider a variety of criteria and circumstances that may have impacted the violation.

Current procedures require a proposer to disclose pending claims, complaints, investigations, proceedings, and/or findings related to alleged labor law/payroll violations. The Assessment Team will consider all such history, but will assess percentage point deductions only for a violation. Although pending claims (claims without a final disposition) will not result in rating point deductions, the occurrence and pending status will be reported to the Board if: 1) the proposer is recommended for a contract award, and 2) the pending claim, if it were ultimately decided adversely to the proposer, would be determined to be a significant or major violation.

With respect to the State Division of Labor Standards Enforcement (DLSE) process and final dispositions, an employee may file a claim with DLSE against his employer when he/she believes there has been a violation of labor law. These claims may remain as pending open cases until the issue is resolved in some manner and a disposition letter is issued and the case is closed. Some claims are "abandoned," others are "settled" or "paid in full." Some are resolved quickly, while other claims and dispositions are appealed and take a long time to resolve.

Departmental Referrals to the Assessment Team

Each department will complete their established proposal review process (with the exception of reviewing violations), including submission of the required inquiry to DLSE. If violations and/or pending claims are disclosed by the proposer, or through inquiry to DLSE, or any other public entity, the department will make referrals to the Assessment Team as follows:

- ☐ If the top-rated proposer has no record of violations or pending claims and the department intends to recommend a contract with the proposer, there is no need to refer any proposers to the Assessment Team.
- ☐ If the top-rated proposer has violations or pending claims, the department must refer documentation of the top-rated proposer's violations or pending claims to the Assessment Team.

- ☐ If the top-rated proposer has violations or pending claims and other proposers have violations or pending claims, the department must refer to the Assessment Team documentation of violations or pending claims for any proposer who could potentially become the top-rated proposer if the maximum 20 percent of total evaluation points is deducted from the score of the original top-rated proposer.

Note: If a top-rated proposer is determined to have a record of major violations or significant undisclosed violations and remains the top-rated proposer even with a deduction for the violations, the contracting department should consider whether to pursue a finding of proposer non-responsibility.

Request for Assessment Team Assistance

To initiate the Assessment Team process, the contracting department will contact the Chair of the Assessment Team and deliver/FAX a copy of all supporting documents for an initial review of completeness. These documents must include the proposer's explanation of any violation or pending claim that the proposer may have provided on the *Acknowledgment and Statement of Compliance* form which is required from all proposers for Proposition A and cafeteria services contracts. The initial Chair of the Assessment Team is Don Chadwick, of the Auditor-Controller, phone (213) 974-0333, FAX (213) 626-1108. Chair duties will rotate annually among Assessment Team member departments.

Note: The contracting department shall not reveal the evaluation score for any proposer submitted to the Assessment Team or the point spread between multiple proposers for the same contract.

- ☐ Once the Chair is satisfied that the information is sufficient to complete an assessment, the Chair will:
 - Notify the other Assessment Team members and the designated County Counsel and arrange a mutually convenient date to complete the assessment; and
 - Request the contracting department to deliver/FAX copies of the supporting documents to the other Assessment Team members.
- ☐ The Assessment Team members may decide to conduct the assessment in person or via a conference call.
- ☐ Staff from the contracting department familiar with the solicitation shall be notified of the assessment date/time and shall be available by phone to answer questions regarding the supporting documents.
- ☐ The final assessment by the Assessment Team shall be a consensus of the members with documentation of the reasons for the decision.

GUIDELINES FOR ASSESSMENT OF PROPOSER LABOR LAW/PAYROLL VIOLATIONS

COUNTY DETERMINATION Proposer Name: _____ Contracting Department: _____ Department Contact Person/Phone: _____	RANGE OF DEDUCTION (Deduction is taken from the maximum evaluation points available)	
	Proposer Fully Disclosed	Proposer <i>Did Not</i> Fully Disclose
MAJOR County determination, based on the Evaluation Criteria, that proposer has a record of very serious violations.*	8 - 10% Consider investigating a finding of proposer non-responsibility**	16 - 20% Consider investigating a finding of proposer non-responsibility**
SIGNIFICANT County determination, based on the Evaluation Criteria, that proposer has a record of significant violations.*	4 - 7%	8 - 14% Consider investigating a finding of proposer non-responsibility**
MINOR County determination, based on the Evaluation Criteria, that proposer has a record of relatively minor violations.*	2 - 3%	4 - 6%
INSIGNIFICANT County determination, based on the Evaluation Criteria, that proposer has a record of very minimal violations.*	0 - 1%	1 - 2%
NONE County determination, based on the Evaluation Criteria, that proposer does not have a record of violations.*	0	N/A

Assessment Criteria

* A "Labor Law/Payroll Violation" includes violations of any Federal, State or local statute, regulation or ordinance pertaining to wages, hours, working conditions such as minimum wage, prevailing wage, living wage, the Fair Labor Standards Act, employment of minors, or unlawful employment discrimination. The County may deduct points from a proposer's final evaluation score only for Labor Law/Payroll Violations with disposition by a public entity within the past three years of the date of the proposal.

The assessment and determination of whether a violation is major, significant, minor, or insignificant and the assignment of a percentage deduction shall include, but not be limited to, consideration of the following criteria and variables:

- **Accuracy in self-reporting by proposer**
- **Health and/or safety impact**
- **Number of occurrences**
- **Identified patterns in occurrences**
- **Dollar amount of lost/delayed wages**
- **Assessment of any fines and/or penalties by public entities**
- **Proportion to the volume and extent of services provided, e.g., number of contracts, number of employees, number of locations, etc.**

** County Code Title 2, Chapter 2.202.030 sets forth criteria for making a finding of contractor non-responsibility which are not limited to the above situations.

- ☐ In the event that a proposer protests a department's final evaluation rating because of a deduction for violations, a member of the Assessment Team shall be available to the contracting department to explain the Assessment Team's determination.

Definition of Terms to Proposers

Proposers will be advised of the County's disclosure requirements for violations (as previously defined) and pending claims in the following documents:

- ☐ County Counsel has prepared mandatory language which departments shall include in all Proposition A and cafeteria services contract solicitations. This language clearly defines: 1) the County's disclosure requirement regarding violations and pending claims; 2) the County's assessment of violation(s), either disclosed or undisclosed by the proposer, as major, significant, minor, or insignificant; and, 3) the range of possible percentage point deductions, based on the assessment of the severity and extent of the violation(s).
- ☐ The Acknowledgment and Statement of Compliance form has been revised to clearly specify requirements for disclosure of violations within three years of the proposal date and all pending claims. Departments currently require all proposers for Proposition A or cafeteria services contract to complete this form to disclose any violations and pending claims. To encourage full proposer disclosure, the revised form indicates that up to 20 percent of the total evaluation points available may be deducted for violations and that failure to disclose a violation results in the largest deduction.
- ☐ County Counsel has prepared mandatory contract language which departments shall include in all Proposition A and cafeteria services contracts. This language clearly defines the contractor's responsibility to disclose violations and pending claims throughout the term of the contract to ensure continued good labor law/payroll practices.
- ☐ For existing contracts, departments shall issue a change notice or contract modification to update contract terms as soon as possible but no later than the time a department exercises an option to renew a Proposition A or cafeteria services contract.

The contracting department shall ensure that appropriate monitoring mechanisms are in place to quickly identify problems and minimize the possibility for violations or limit their severity and extent.

Living Wage Implementation Plan and Training Manual

The Assessment Team will develop administrative procedures, including time frames, and distribute to all department heads and departmental contracting staff. The Living Wage Implementation Plan and Training Manual will be revised to reflect the above changes and training will be provided to appropriate departmental staff on July 26 and August 1, 2001.